favour and if the moneylender and borrower then sign the note or memorandum under section 16 varied accordingly, is it to be said that because, by oversight or by design on the part of the borrower, the copy is not amended to show the variation agreed subsequent to the time when the copy is required by the statute to be delivered that the borrower is to be absolved from his obligation.

In the words of Lord Radcliffe in *Kasumu* v. *Baba-Egbe* (2) "the statute is not concerned with the vice of its (the contract's) content but with the vice of the conditions under which it was made". As the learned Lord President has drawn to notice there was no vice in the conditions under which the contract was made. The borrower had his solicitor beside him advising him at all stages of the negotiations and at the execution of the contract.

For the above reasons I am of opinion that the *ratio decidendi* of the English cases such as (1) *Eldridge and Morris* v. *Taylor and Wife* (5) and (2) *T. W. Bennett & Co. Ltd.* v. *Smith* (6) in which the sufficiency or otherwise of the copy of the note or memorandum delivered to the borrower has been considered is not applicable in considering the provisions of section 16 in this regard.

Gill J.: I have had the advantage of reading the judgment of the learned Lord President and am in full agreement with it.

Appeal dismissed.

Solicitors: *Joseph & Son; Heng, Chen & Co.*

REDLAND TILES LTD. & ORS. v. KUA HONG BRICK TILE WORKS

[O.C.J. (Abdul Aziz J.) March 16, 1966]

[Kota Bahru — Civil Suit No. 52 of 1964]

Patents and Designs — Design registered in United Kingdom — Infringement — Injunction — United Kingdom Designs (Protection) Ordinance, 1949, s. 2.

Injunction — Infringement of registered design — Tiles — Destruction order — Disposal order.

This was an action for infringement of a registered design in relation to tiles. It was alleged that the defendants manufactured tiles of the like shape and configuration as the design registered by the plaintiffs in the United Kingdom. The defendants' contention was that the tiles were of different designs and appearance.

Held: in actions for infringment of a registered design the eye is the sole test and looking at the two sets of tiles it was clear that the sizes, profiles and configuration of these tiles were so similar that they were likely to confuse and therefore the application for an injunction must be granted.

CIVIL SUIT.

H. L. Wrigglesworth for the plaintiffs.

Isahak bin Abdul Hamid for the defendants.

Abdul Aziz J. (delivering oral judgment): This is an action for infringement of a registered design and not an action in relation to trade marks. Therefore, the question of passing off has no relevance and the question of the names of the various products also has no relevance.

Plaintiffs No. 1, i.e. Redland Tiles Limited are the proprietors of a valid registered design bearing No. 862055 for roofing tiles, the novelty features of which, as set out in the certificate, lie in the feature or shape and configuration of the article as shown in the representation annexed thereto, a specimen of which was exhibited in court and produced for inspection. By virtue of section 2 of the United Kingdom Designs (Protection) Ordinance, 1949 the registered proprietors enjoy, in the Federation, the like rights and privileges as though the certificate has been issued in the United Kingdom with an extension to the Federation. Plaintiffs No. 2, i.e. Concrete Industries (North Malaya) Ltd. are the licensees of plaintiffs No. 1 to manufacture tiles for sale in Malaya. It was alleged that the defendants manufactured cement tiles of the like shape and configuration as the design registered in the United Kingdom. The defendants' contention was that these tiles were of different designs and appearance. They went on to contend that there were distinct differences between the two types of tiles in the markings and in the configuration and that, therefore, the members of the public are not likely to be deceived thereby. As I have said earlier the question of passing off has no relevance at all to the proceedings. *Halsbury's* (3rd Ed.) Volume 38 at page 675 has this to say in regard to infringement of registered design:—

"The registration of a design under the Registered Designs Act, 1949, gives to the registered proprietor the exclusive right in the United Kingdom and the Isle of Man (and by virtue of the Ordinance also in the Federation) to make or import for sale or for use for the purpose of any trade or business, or to sell, hire or offer for sale or hire, any article in respect of which the design is registered; the right extends to articles to which either the registered design or a design not substantially different from the registered design has been applied, and includes the right to make anything for enabling any such article to be made as aforesaid in the United Kingdom or the Isle of Man or elsewhere. Any infringement of this exclusive right may give rise to proceedings. Knowledge of the registration of a design is in general immaterial to infringement.

The question whether a design which is alleged to infringe a registered design is or is not an infringement must be determined by the eye alone. The court has to decide only whether the alleged infringement has the same shape or pattern, and must eliminate the question of the identity of function, since another design may have parts fulfilling the same functions without being an infringement. Small differences in detail do not necessarily prevent infringement, but generally speaking, if under normal conditions of user the eye would not confuse the two designs, there is no infringement. If there is some outstanding feature of the registered design which is not reproduced, this would generally

negative infringement. It is not an actionable imitation merely to take the idea suggested by the design unless it works out in the way protected by the registration. Where an article may be readily manipulated into a position similar to the illustration of a design registration, there will be infringement."

Therefore, the eye is the sole test and looking at the two sets of tiles one would find that the sizes, the profiles and the configuration of these tiles when laid together are so similar that they are likely to confuse, and there appears to be no outstanding features to distinguish between these two sets of tiles. As the claim for damages has been abandoned it is not necessary for me to consider whether the defendants were aware of the registration of the design.

Consequently there will be an order for injunction in terms of the prayer.

As regards prayer (b) the plaintiffs have conceded that it would be wasteful to destroy approximately 25,000 pieces now held by the defendants as stock. It was suggested that these tiles should be delivered and donated to some religious or charitable institution. The defendants maintained that these tiles were manufactured before they received the notice from the plaintiffs. They should, therefore, be allowed to dispose of the stock now held by them. In my view an order for destruction or delivery is consequential upon the finding that there was an infringement of the design. If the contention of the defendants is granted it would defeat the purpose for which these proceedings were brought.

Consequently there will not be an order for destruction as prayed but in lieu thereof there will be an order that the stock of tiles now held by the defendants be delivered to the bailiff of this court for distribution to religious and charitable institutions at the discretion of the assistant registrar. There will also be an order for costs against the defendants.

Order accordingly.

Solicitors: *Wrigglesworth & Co.; Isahak Hamid & Co.*

SENG CHONG METAL WORKS LTD. v. LEW FA

[F.C. (Thomson L.P., Ong Hock Thye F.J. and Gill J.) March 17, 1966]

[K.L. — Federal Court Civil Appeal No. X. 3 of 1966]

Damages — Personal injury — Left hand — Amputation up to wrist leaving stump of thumb.

Machinery Ordinance, 1953 — Machinery (Driven Machinery) Regulations, 1959, reg. 31 — Breach of statutory duty — Contributory negligence.

The respondent an apprentice machine operator employed by the appellant company, suffered injuries while operating a press brake machine. As a result of the accident a portion of his left hand had to be amputated. He sued his employers for breach of statutory duty and in the event Abdul Aziz J. found in his favour and awarded him *inter alia* $43,000 general damages ([1966] 1 M.L.J. 231). The employers appealed against the finding on the question of liability, arguing that there was contributory negligence on the part of the respondent.

Held: although without some sort of inadvertence on the part of the workman the accident could not have happened, nevertheless, in this case the fundamental cause of the accident was the failure to comply with the machinery regulation, the failure to supply proper guard, and having regard to the policy of the law which is to protect workmen operating potentially dangerous machinery, any inadvertence on the part of the respondent did not go so far as to constitute contributory negligence.

Observation on the award of damages.

Cases referred to:—

(1) *Mitchell* v. *North British Rubber Co. Ltd.* [1945] S.C. (J) 69, 73.

(2) *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15, 16.

FEDERAL COURT.

H. E. Cashin for the appellant.

Kam Woon Wah for the respondent.

Thomson L.P. (delivering oral judgment): The plaintiff in this case at the material time was an apprentice machine operator employed by the defendant company in a factory at Kuala Lumpur. In the course of his employment he suffered injuries while operating a metal working machine known as a press brake. The injuries which he suffered were very severe and a portion of his hand had to be amputated.

In consequence he sued his employer for breach of statutory duty, the alleged breach being a failure to fence the machine, such failure being a contravention of Regulation 31(i) of the Machinery (Driven Machinery) Regulations, 1959.

The defences were a denial of breach and contributory negligence.

In the event Abdul Aziz J. found in favour of the plaintiff and awarded him a very substantial sum of money, $43,000 general damages and $450 special damages.

Against that judgment the employer has now appealed, but his appeal only relates to the question of the liability. There is no appeal on the question of quantum of damages and therefore it is not competent for this court to consider the quantum, although for myself I would express the view that the award was an extremely generous one.

Mr. Cashin, who appeared for the appellant, with his customary candour, has conceded that he could not well contest the judge's finding that there was a breach of the machinery regulations.